

**BEFORE THE
OFFICE OF THE SECRETARY
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing)	
The Telephone Consumer Protection)	CG Docket No. 02-278
Act of 1991)	
)	
)	
To: The Commission)	
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**CONSUMER BANKERS ASSOCIATION PETITION FOR RECONSIDERATION AND
CLARIFICATION**

The Consumer Bankers Association¹ (“CBA”) hereby respectfully requests that the Federal Communications Commission reconsider its position and clarify aspects of its recently published Report and Order in GC Docket No. 02-278, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act (“TCPA”). CBA is filing this petition as well as joining one filed by the Financial Services Coalition. This petition discusses the rules for retail banker businesses with an emphasis on Auto Finance Lenders. The latter also applies generally but emphasizes mortgage lending. CBA appreciates the stay regarding this issue granted by the Commission and would be happy to provide additional information.

CBA represents retail financial services companies who work closely with auto dealers, mortgage bankers and insurance agents. In all of their relationships, the companies rely on facsimiles to communicate within the company, as well as with the auto dealer, mortgage banker and insurance

¹ The Consumer Bankers Association was founded in 1919 and is a not-for-profit trade association that provides leadership and representation on retail banking issues such privacy, fair lending, and consumer protection legislation/regulation. CBA develops policy that affects financial institution retail products and services. CBA members include most of the nation’s largest bank holding companies as well as regional and hold two-thirds of the industry’s total assets. CBA is the recognized voice on retail banking issues in the nation’s capital. **Member institutions are the leaders in consumer finance (auto, home equity and education), retail electronic commerce, small business services, and community development.**

agent communities. The brokers, agents or intermediaries ultimately use the information in their transactions with consumers.

The CBA recognizes that facsimile transmissions that contain unsolicited advertising impose costs on the recipient for the use of the equipment, costs of the paper and ink, and the inability to receive other facsimiles until the advertisement has been transmitted. These costs are most difficult to justify in the consumer context and were clearly a major impetus for the adoption of Paragraph Numbers 187 through 191. However, the TCPA also governs commercial facsimile transmissions, and in the context of lending and insurance, especially consumer mortgage lending, the Commission's new position has far-reaching unintended consequences. Because the Commission has reversed its longstanding prior position that an "established business relationship" ("EBR") between the sender and recipient provide the requisite express permission to send a facsimile, a person or business must have express written permission to send an unsolicited facsimile advertisement even where the recipient is engaged in an ongoing business relationship with the sender. If the Commission does not reinstate the EBR exception or provide further clarification, it will disrupt the well-established method of communication between the consumer and commercial lending and insurance industry and loan or insurance brokers, intermediaries and others that rely on frequent communication of the most current pricing available. The majority of these entities serve the vast community of consumer borrowers and insured throughout the United States and thus, without further action on the part of the Commission, Paragraph Numbers 187 through 191 will harm the ability of mortgage and other lenders, insurers, brokers and intermediaries to respond to consumer and small business' needs, particularly in a time of volatile interest rates and product terms.

This Request asks the Commission to reinstate the EBR exception, so that if the lender and insurer and broker or other intermediary have engaged in a course of dealing such that they have

chosen to utilize facsimile as a method of communication, they can continue to do so, since that form of communication is not unsolicited, regardless of the content of the facsimile

If in reconsideration, the Commission does not reinstate the EBR exception, we request that the Commission clarify that a rate sheet or other business-related facsimile sent by a lender or insurer to a broker or other intermediary such as an automobile dealer defining the terms on which the parties may conduct a transaction is not an “unsolicited advertisement” as defined in 47 U.S.C. § 227(a)(4) and 47 C.F.R. § 64.1200(f)(5).

I. The Commission should reinstate the Established Business Relationship exception.

The use of facsimiles as an agreed method of communication does not contravene 47 U.S.C. § 227(a)(4) and 47 C.F.R. § 64.122(f)(5), since such facsimiles are not unsolicited, regardless of their content. By reversing the longstanding EBR exception in Paragraph Number 189, the Commission disrupts the business operations of lenders, insurers, brokers, correspondents, and other intermediaries who have relied on their ability to use facsimiles as an accepted method of communication. Facsimile technology allows a timely and efficient means of reaching a business in an industry where speed is of the essence. Financial institutions, in particular, use facsimiles for many purposes when communicating with automobile dealers, including sending dealer rate sheets and dealer specials. Similar use of facsimiles is made by lenders and insurers to transmit rate sheets, product terms, and other information, in the ordinary course of business to and from mortgage brokers, correspondents, and other intermediaries. Facsimiles are used for myriad purposes, including obtaining additional information about a prospective transaction, verifying transaction terms and confirming agreements.

These benefits will be lost if the industry is required to scrutinize each facsimile transmission to determine if it could contain an advertisement before deciding whether it is one that can be sent

without current written confirmation that the recipient has agreed to such a transmission. If the business has engaged in a course of conduct whereby facsimiles are an accepted method of communication, use of that method should be allowed to continue uninterrupted. Otherwise, the sender of a facsimile confirming the terms of a loan would face the risk that a court could inappropriately characterize the facsimile as an advertisement unless the sender had a current written permission to facsimile in its files. Where parties have conducted business on the basis of facsimile transmissions in the past, facsimile contacts are not unsolicited and should not depend on the content of the facsimile. It is respectfully requested that the Commission reinstate the EBR exception, so that facsimile transmissions are not unsolicited advertisements if lenders, insurers, brokers, correspondents, and other intermediaries choose to conduct business on the basis of facsimiled communications.

II. Rate Sheets and Other Business-Related Facsimile Transactions are Not Unsolicited Advertisements.

The TCPA prohibits the use of any telephone facsimile machine, computer or other device to send an “unsolicited advertisement” to a telephone facsimile machine. An unsolicited advertisement is defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).

CBA requests that the above definition be considered in the context of the wholesale mortgage lending and insurance business and business transacted with auto dealers. Today, loan and insurance brokers and intermediaries such as automobile dealers, particularly those that serve consumers and small businesses, play an important role by acquainting their clients with the product offerings of

many lenders and insurers, counseling and pre-qualifying them for loan and insurance products and submitting application packages. Loan brokers and intermediaries have become a primary conduit between borrowers and lenders, since many borrowers do not have the time or the knowledge base to obtain information on products that might be the best fit for their needs. For example, mortgage brokers and intermediaries such as automobile dealers represent the products of many different lenders. An individual mortgage broker or other intermediary may submit prequalification inquiries and application packages to several lenders in an attempt to obtain several product choices for the client. Interest rates and the demands of the secondary market for loan products cause a lender to change interest rates and product terms daily and in some cases hourly.

In order to conduct business in this wholesale channel, the broker or intermediary needs accurate and timely information about product offerings. Lenders and insurers cannot reach the borrower or consumer community unless they are able to communicate quickly and conveniently with brokers and intermediaries. Facsimile transmissions are the single most effective way for lenders and insurers to communicate with brokers and intermediaries and for those brokers and intermediaries to provide information to their clients. As a result, lenders, insurers, loan brokers and intermediaries do business on the basis of information communicated in rate sheets. The rate sheets contain the interest rates, fees, premiums, qualifications and terms for the loans or products the lender or insurer offers as well as information on which loan or insurance product types may have changed or been improved. Facsimiled rate sheets are not unsolicited advertisements when the lender and broker are using them to establish the terms of a transaction.

The lending, insurance, broker and intermediary communities require clarification that rate sheets are not unsolicited advertisements under the TCPA in order to continue to do business in the present rapidly changing economic environment without the fear that a court will inappropriately hold

that these communications are unsolicited advertisements. Without such clarification, lending and insurance markets will be disrupted. Consumer and small business needs will be unmet if lenders or insurers feel compelled to wait for written permission before they can facsimile rate sheets to brokers and intermediaries. Consumer spending has been the backbone of the current economic recovery and procedures that burden the ability to enter into necessary transactions in a timely and efficient manner could have a chilling effect on the continuation or growth of the recovery.

II. Conclusion

For the reasons stated herein, the Commission on reconsideration should revised its rules as requested herein.

Respectfully submitted,

Consumer Bankers Association

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